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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket 92-266
	)	
Rate Regulation	)	

REPLY TO OPPOSITIONS TO PETITIONS FOR RECONSIDERATION

Pursuant to Section 1.429 of the Rules, 47 C.F.R. § 1.429, the Center for Media Education, the Association of Independent Video and Filmmakers, the National Association of Artists' Organizations, and the National Alliance for Media Arts and Culture (hereinafter collectively referred to as "CME") respectfully reply to aspects of certain Oppositions to Petitions for Reconsideration filed in the above referenced proceeding concerning leased access.

I. Leased Access Channels Should be Provided on a First-Come First-Served Basis.

The cable industry argues that the Commission should not require leased access channels to be provided on a first-come first-served basis. Continental Opp. at 33-34; Cablevision Industries et al. Opp. ("Cablevision Opp.") at 20 n.30. Continental, for example, contends that "[n]owhere in the statute is there authority to divest cable operators of all control over the nature of commercial leased access programming." Continental Opp. at 33. And Cablevision argues that preventing operators

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from considering the content of leased access programming is inconsistent with the "emergence of 'diverse sources of video programming.'" Cablevision Opp. at 20 n.30.

The cable industry clearly misunderstands the very purpose of leased access. First, the statute provides that leased access channels shall be entirely beyond the editorial control of the cable operator.[1] It is necessary to fully divorce the cable operator from content-based decisions because of the strong incentives to discriminate against programming that will compete with programming on the cable operator's regular channels. See CME Comments at 30. Thus, to ensure that leased access is a genuine outlet for diverse voices, the Commission should require an operator to enter into leases in the order it receives requests from prospective lessees.

Second, it is misguided to suggest that providing leased access on a first-come first-served basis is somehow inconsistent with the promotion of "diverse sources of video programming." The leased access provisions specifically were intended to provide access to those programmers who were unable to gain

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[1] Section 612(c)(2) provides:

> A cable operator shall not exercise any editorial control over any video programming provided pursuant to this section, or in any other way consider the content of such programming, except that an operator may consider such content to the minimum extent necessary to establish a reasonable price for the commercial use of designated channel capacity by an unaffiliated person.

access on the regular cable channels.[2] If the Commission permitted the cable operator to choose which programmers could lease channels, the cable operators would ensure that lessees do not provide programming that competes with programming on the regular cable channels. Therefore, prohibiting cable operators from choosing which programmers will be permitted to lease channels necessarily results in an increase in the diversity of programming sources. To ensure the greatest diversity of programming sources, CME urges the Commission to require access on a first-come first-served basis.

II. The Commission Must Ensure that the Prices for Leased Access are Affordable for All Programmers.

The cable industry seeks to set rates that are unaffordable for almost any programmer. CME opposes any effort by the industry to raise rates above the highest implicit access fee within the three programming categories. Indeed, CME reiterates its claim made in earlier pleadings that the Commission should adopt the average implicit fee as the maximum reasonable rate. See CME Pet. at 2. In addition, CME urges the Commission to adopt additional programming categories. Id. at 6.

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[2] The House Report on the 1984 Act states that "[l]eased access is aimed at assuring that cable channels are available to enable program suppliers to furnish programming when the cable operator may elect not to provide the services as part of the program offerings he makes available to subscribers." H.R. Rep. No. 934, 98th Cong., 2d Sess. 47 (1984).

A. The Highest Implicit Access Fee is Too High Because of the Monopsony Position of the Cable Operators.

Continental challenges CME's claim that the highest implicit access fee mirrors the cable industry's current monopsony rates which have distorted current implicit fees. Continental Opp. at 29 n.8. Continental claims that the Commission has never found that a monopsony relationship exists between cable operators and its programmers. Id. Rather, Continental argues, the Commission merely has stated that there is a possibility that such a relationship exists. Id. Moreover, Continental claims that even if such a relationship exist, "any distortion of program prices would logically favor the lessees." (emphasis in original) Id.

Continental's logic is fundamentally flawed. Congress found that most cable operators face no local competition. See Cable Television Consumer Protection Competition Act of 1992 § 2. Just as a cable operator has a monopoly relationship with its subscribers, it has a monopsony relationship with its programmers. Therefore, because the rates a cable operator pays for its programming will be low and the rates subscribers pay will be high, the resulting implicit fee will be very high. The distortion clearly does not favor the lessee.

B. The Commission Should Expand the Number of Programming Categories and Set Lower Non-Profit Rates.

In fact, the distortion in programming prices results in rates that are too high for almost all programmers, particularly non-profit programmers. Despite these already high rates, the cable operators are attempting to raise the rates even higher.

For example, Time-Warner argues that the Commission should abandon its three programming categories. Time-Warner Opp. at 31. Similarly, Cablevision contends that the Commission should establish only two categories -- per channel/per event and all others. Cablevision Opp. at 18. As CME argued in its Petition, even three programming categories will not result in rates that are consistent with the financial capabilities of different types of programmers. See CME Pet. at 6-8. To eliminate the programming categories altogether surely would undermine the viability of leased access; a programmer would be required to pay the highest implicit fee paid on the cable operator's entire system. Such a rate would clearly be prohibitive to any lessee.

If, however, the Commission retains the three programming categories, Time-Warner argues that "[w]here a cable operator already carries a category of leased access programming, unless shown otherwise, the rates charged should be deemed the product of arm's length, market-driven negotiations. Time-Warner Opp. at 32. The price charged to a leased access programmer, however, could not be the result of "market-driven" negotiations because the Commission found that no market exists for leased access.[3] Order, ¶514. The Commission, therefore, should reject this recommendation.

[3] The cable operators seem unwilling to accept the Commission's finding that there is no market for leased access. Continental, for example, argues that the Commission "should reject efforts by Petitioners to secure below market pricing." Continental pet. at 29. If there is no market, however, there can be no "market pricing."

III. The Commission Should Ensure Fair and Expeditious Complaint Procedures.

Several cable operators take issue with CME's claim that the Commission should require cable operators to place in their public file all documentation in support of their rate schedules so that a petitioner will be able to "state concisely the facts constituting a violation of [the Commission's] leased access rules."[4] Order, ¶534. Cablevision argues that the release of proprietary information is not necessary because "it appears that a programmer would satisfy its pleading obligations in a rate dispute simply by alleging that a given rate was higher than the maximum reasonable rate. . . ." Cablevision Opp. at 22 n.33.[5] Cablevision bases its claims on the Commission's statement in a footnote that "[i]n the case of a rate dispute, a petitioner would have to allege that a given rate was higher than the maximum reasonable rate permitted under our rules." Order at n.1350.

Cablevision erroneously interprets the lessee's evidentiary burden. The rules do not require that the lessee merely "allege" that a rate is excessive. The rules state that a lessee "will be required to state concisely the facts constituting a violation of

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[4] The cable operators also contend that the burden of proving by clear and convincing evidence that the rates are unreasonable is appropriately placed on the lessee. See Cablevision at 22-23. CME disagrees. See CME Pet. at 19.

[5] Similarly, Continental argues that "for the complainant to satisfy its burden regarding a rate issue, it need only allege that the rate is excessive." Continental Pet. at 35 (emphasis in original).

our leased access rules." Order, ¶ 534. The requirements of this provision are not mitigated by the Commission's statement that in a rate dispute the lessee must state that the quoted rate is higher than the highest implicit access fee. Order at n.1350. Clearly, in a rate dispute the lessee must allege that the quoted rate is higher than the permitted rate maximum. However, because the complaint filed by the lessee will serve as the basis upon which the Commission will determine whether the lessee has made out a prima facie case, the lessee must do more than just "allege" that a rate is excessive.

The lessee's complaint must allege a violation of the Commission's rules sufficient to make out a prima facie case. By definition, to make out a prima facie case, the lessee would be required to submit evidence to support her allegations. Clearly, to support a claim that a quoted rate is higher than the highest implicit access fee the lessee would need access to the data upon which the cable operator based its rate.[6] Indeed, without such data, it would virtually impossible to make out a prima facie case.[7] CME thus urges the Commission to require cable operators to make public the data used to set rates.

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[6] In addition, if lessees had access to such data, they would be able to make an informed decision about whether or not to file a complaint in the first instance.

[7] Moreover, if the Commission concludes that a lessee has made out a prima facie case, the lessee would be required to prove by clear and convincing evidence that the rates are unreasonable. No lessee will be able to meet this higher evidentiary burden without access to such data.

CONCLUSION

The Oppositions to Petitions submitted by the cable operators are additional evidence that the Commission cannot rely on the cable operators to set reasonable rates, terms and condition. First, cable operators oppose the request that leases be granted on a first-come first-served basis. If not required to do so, however, strong incentives exist for cable operators to discriminate against programming that will compete with programming on its regular channels. In addition, divorcing cable operators from content-based decisions will ensure a diversity of programming sources, as intended by Congress.

Second, cable operators unreasonably seek to eliminate or reduce the programming categories. The number of programming categories established by the Commission already result in rates that are too high, particularly for non-profit programmers. A further increase in leasing rates will merely serve to undermine Congress' intent to promote competition and diversity. Thus, the Commission should increase the number of programming categories and set lower rates for non-profit programmers.

Finally, cable operators seek to protect all proprietary data. However, without access to the data upon which the cable operators set rates, lessees will be unable to successfully challenge an excessive rate. It is crucial to the success of leased access that the complaint process not be stacked up against the lessee.

For the foregoing reasons, CME respectfully requests that

the Commission deny the Oppositions to Petitions for Reconsideration mentioned herein.

Respectfully submitted,

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August 4, 1993

CERTIFICATE OF SERVICE

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